No. 08-1464

Supreme Court, U.S.
AUG 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief is respectfully submitted pursuant to Rule 15 of the Rules of the Supreme Court on behalf of Petitioners East End Property Company #1, LLC, et al. ("East End"), whose Petition for a Writ of Certiorari is currently pending before the Court. This brief requests that the Supreme Court judicially notice related, public proceedings of record which recently occurred, and are currently occurring before the Town Board of the Town of Brookhaven, one of the respondents in this case, as "*other intervening matter not available at the time of the party's last filing.*"

The central claim raised by East End's Petition is that respondent Caithness Long Island LLC ("Caithness"), a national power plant developer, unlawfully obtained approvals from respondent Town of Brookhaven, a suburban Town in New York State, to construct a regional electric power plant in an unlawfully bargained-for exchange with Town Board members over the amount, and allocation of a multi-million dollar Community Benefits Package. Under the Community Benefits Package, millions of dollars were paid by the power plant applicant (Caithness), and then distributed to various public constituencies (local civic organizations, community centers, local school organizations and districts, etc.) favored by the Town Board members who voted upon the power plant approvals. The Petition asserts claims of substantive due process, and procedural due process violations, alleging that the approval process was unlawfully corrupted by the massive financial inducements paid by Caithness, the applicant (*see Caperton v. A.T. Massey Coal Co. Inc.*, ___ U.S. ___,

129 S.Ct. 2252), in exchange for required environmental and zoning approvals ultimately granted by the Town Board (which initially voted to *deny* a required environmental approval, but which then revoted and granted approval *after* the amount of the financial inducement was increased).[1]

We now respectfully request that the Court judicially notice (FED. R. EVID. 201) continuing public proceedings of record occurring before the Brookhaven Town Board relating to the Caithness Plant and the allocation of the Community Benefits Package to local community organizations. Specifically, the Town Board recently resolved to distribute "*the remaining $4,000,000 in grant money the Town is set to receive from the Caithness Long Island Power Plant*" (*see* Supplemental Appendix 1, Article appearing in *Newsday*, "**Groups will get Caithness cash,**" on August 19, 2009), reporting on proceedings before the Brookhaven Town Board.[2]

In relevant part, the *Newsday* article reports that "*Town Board members squabbled in recent weeks*

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[1] One Town Board Member conceded, on the *record*, that "*they [Caithness and LIPA] came to me and indicated to me what they were prepared to add to the [benefits] package because of my unhappiness*," and that in response, he cynically bargained with Caithness to obtain "*more benefits . . . com[ing] to my district*" before *changing* his vote from one of *disapproval* on the first vote, to one of *approval* on the second (JR. 3516-3519). He was subsequently quoted in a local newspaper boasting to his constituents that "***I did not consider voting for Caithness until I got $1 million for Medford*** *[an area in his district]*."

[2] We have requested the actual Minutes of proceedings before the Town Board, and will provide them in lieu of the *Newsday* article as soon as a properly certified copy of the Minutes is available (Supplemental Appendix 2).

over how the money—which is set aside for groups in the Community around the plant—should be allocated" and states:

> "[Councilmember Connie] Kepert proposed to *split responsibility for distributing money between the three Town Board members who represent areas around Caithness [the plant]* —herself [Councilmember Tim] Mazzei, and councilman Keith Romain.
>
> * * *
>
> 'I didn't think it would be this difficult to give away 5 million dollars' she [Councilmember Connie Kepert] said."

All of the respondents have argued in their respective briefs in opposition to the Petition that the multi-million dollar Community Benefits Package, doled out among various community groups, did not impact the voting councilmembers' decision to approve or not approve the Caithness plant in contravention of *Caperton v. A.T. Massey Coal Co., Inc., supra*, or could otherwise be justified in retrospect and re-characterized (also in retrospect) as a type of PILOT (payment-in-lieu-of-taxes).

Accordingly, we now respectfully request that the Court judicially notice the continuing public proceedings of record occurring before the Brookhaven Town Board relating to the actual doling out of the money, so that the Court may discern (a) how the corrupt and corrupting monetary inducement was, in fact, the *sine qua non* for the approval of the Caithness Power Plant, and (b) that the doling out of such money cannot remotely be justified as a legitimate or bona fide PILOT (payment-in-lieu-of-taxes), particularly where, as here, the large monetary pay-

ment does not remotely qualify as a legitimate PILOT under governing law (*see* Br. in Supp. of Cert. Pet. at 11-17; *see also* Reply Br. in Supp. of Cert. Pet. at 2-3), and the public proceedings over doling out the money to various community groups flatly dispels any conceivable and revisionist notion that the multi-million dollar inducement for approval of the massive Power Plant was earmarked for tax-based expenditures.

Dated: August 24, 2009

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

APPENDIX 1

Newsday Article, Wednesday, August 19, 2009

BROOKHAVEN

Groups will get Caithness cash

Brookhaven officials have put aside their differences and crafted a plan to give community groups the remaining $4 million in grant money the town is set to receive from the Caithness Long Island power plant.

The money comes from Caithness and Long Island Power Authority as part of a $5-million "community benefits package" to the town. Town board members squabbled in recent weeks over how the money — which is set aside for groups in communities around the plant — should be allocated.

A standoff occurred after the town board approved about $330,000 for Lighthouse Mission, a Patchogue charity, and the North Patchogue Fire Department without first getting recommendations from the Caithness Advisory Committee, a citizens group. Councilwoman Connie Kepert said the allocations "circumvented" the citizens group; Councilman Tim Mazzei said the organizations needed the money to operate.

Kepert proposed to split responsibility for distributing the money between the three town board members who represent areas around Caithness — herself, Mazzei and Councilman Keith Romaine.

But Kepert and Mazzei said they have agreed to let the advisory committee make recommendations before the town makes any future grants, and Kepert's legislation has been scrapped.

"I didn't think it would be this difficult to give away give 5 million dollars," she said.

– PATRICK WHITTLE

APPENDIX 2

[LETTERHEAD OF ROSENBERG, CALICA & BIRNEY LLP]

August 20, 2009

VIA FACSIMILE 631-451-9264
AND FEDERAL EXPRESS

Hon. Pamela J. Betheil, Clerk
Town of Brookhaven
Office of the Town Clerk
One Independence Hill
Farmingville, NY 11738

Re: Town Board Meetings relating to Caithness Long Island Energy Center and Long Island Power Authority

Dear Ms. Betheil:

We are attorneys for East End Property Company #1, LLC, and others in connection with certain litigation involving the Town Board of the Town of Brookhaven ("East End Property Company #1, LLC, et al. v. Town Board of the Town of Brookhaven, Caithness Long Island LLC and the Long Island Power Authority", Supreme Court of the United States Docket No. 08-1464).

In connection with certain pending proceedings before the Supreme Court of the United States, we require copies of Minutes of recent (i.e., within the past 60 days) Town Board meeting relating to the Caithness Long Island Energy Center in Yaphank, New York which is reported in the enclosed Newsday

article August 19, 2009 ***("Brookhaven: Groups will Get Caithness Cash")***.

The Newsday article cites to, and quotes statements made by Councilmembers Connie Kepert, Timothy Mazzei and Keith Romaine, but the date or dates of the Town Board meetings are not otherwise identified.

Consequently, we are requesting copies of the Minutes of all meetings within the past 60 days (both public and work sessions) at which the Caithness Long Island Energy Center, the Long Island Power Authority and the "Community Benefits Package" were the subject of Board discussion).

Please expedite this request. If convenient, please provide me with the name and telephone number of the Official Court Reporter for the Town who may be contacted directly to obtain this information on an expedited basis.

Very truly yours,

/s/ ROBERT M. CALICA

Robert M. Calica

RMC:ds
cc: John M. Denby, Esq. (via e-mail)
Devitt Spellman Barrett LLP
Jeffrey A. Miller, Esq. (via e-mail)
Westerman Ball Ederer Miller & Sharfstein, LLP
Stephen L. Gordon, Esq. (via e-mail)
Beveridge & Diamond, P.C.
Christine Fazio, Esq. (via e-mail)
Carter Ledyard & Milburn LLP